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# **Narrowing the Scope of Judicial Review for Humanitarian Appeals of Deportation Orders in Canada, New Zealand and the United States**

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## **ABSTRACT**

The paper will compare the humanitarian and compassionate appeal provisions in relevant immigration law allowed to deportees in Canada, New Zealand and the United States. It argues that while recent changes in each of the countries have preserved the humanitarian appeals process, the basis of the appeal and judicial review have been dramatically narrowed by changes in legislation and case law. These changes have particularly limited the scope of judicial review and the ability of the courts to overturn administrative decisions regarding the fitness of an applicant to benefit from the appeal provisions.

## **I. INTRODUCTION**

Immigration policy is inextricably linked to a nation's sovereignty as defining the desirable members of the community within the territory is part of defining the nation itself.<sup>4</sup> From this

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<sup>4</sup> CATHERINE DAUVERGNE, *MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW* (Cambridge University Press, 2008) (For a discussion of the impact globalisation has had on immigration and nationality

perspective, immigration policy is invariably bound up in notions of state and national identity within the context of the international system. As such, immigration scholar Cheryl Shanks argues that changes in the international context are critical to understanding immigration policy since these changes to migrant flows help to crystallise a definition of “self” in the host country.<sup>5</sup> Shanks argues that identity and behaviour are critical elements as justifications for regional or national quotas or as a basis for prohibiting migrants bearing certain undesirable behavioural attributes. At the same time, the rights and judicial protections accorded immigrants are often different from those accorded citizens or other minorities. Immigrants, deportees and “excluded” individuals are generally not considered protected minorities who would be entitled to appropriate equal protections and due process under domestic law. Immigration policy and law, as bound up in sovereignty prerogatives and foreign policy more generally, is left by the courts to the political branches.

These notions are particularly evident in deportation or removal situations. Deirdre Moloney defines deportation or removal as a “state-mandated process by which non-citizen immigrants are expelled from a nation and returned to their countries of origin after residing in the state, on the basis of an administrative determination that they have violated immigration policy or committed a crime.”<sup>6</sup> Exclusion, on the other hand, is where someone seeking entry or arriving in a state is turned away for a myriad of reasons, such as possessing an invalid visa or having been convicted of certain crimes in their country of origin.<sup>7</sup> In addition to those forcibly

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policy see Stephen Legomsky, *The Last Bastions of State Sovereignty: Immigration and Nationality go Global*, in CHALLENGES OF GLOBALIZATION: IMMIGRATION, SOCIAL WELFARE, GLOBAL GOVERNANCE 43 (Andrew Sobel ed., 2009)).

<sup>5</sup> CHERYL SHANKS, IMMIGRATION AND THE POLITICS OF AMERICAN SOVEREIGNTY, 1890-1990, pp. 10-30 (2001).

<sup>6</sup> DEIRDRE MOLONEY, NATIONAL INSURITIES: IMMIGRANTS AND U.S. DEPORTATION POLICY SINCE 1882, at 8 (2012).

<sup>7</sup> In 2013 the total number of individuals either removed or excluded from entry to the U.S. numbered 358,000 Anthony Advincula, “US deported around 369,000

removed, there are those who ‘voluntarily return’ to their country of origin. This is typically done in response to apprehension and threat of deportation or removal. Moloney further describes the removal process as an “administrative, not criminal process and thus offers insufficient enumerated protections for those facing hearings and possible expulsion.”<sup>8</sup>

The criteria by which individuals are excluded by deportation or exclusion for the state however, often times does not preclude additional or equitable considerations where domestic immigration law would warrant removal. Various international legal instruments, constitutional texts and common law rights, plus the “all-or-nothing” aspect of legal rules have preserved an area of discretion for decisions-makers based on equitable and humanitarian considerations. While such appeals are not afforded to all individuals,<sup>9</sup> these appeals, initially decided by the executive or administrative appellate tribunals, are subject to only limited judicial review. Moreover, in line with security-oriented and identity-based national and international contexts,<sup>10</sup> the scope of these humanitarian appeals, both at the administrative and court level, have decreased over the past several decades. In New Zealand, the removal of the five-prong humanitarian test found in sections 22 and 105 of the *Immigration Act 1987* reduces the scope of judicial review on immigration decisions as well as lessens the impact of international law with the concomitant greater scope for executive discretion.<sup>11</sup> Given this wide new discretion and the low

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immigrants in 2013” GLOBAL NATION.NET (Jan. 5, 2014) <http://globalnation.inquirer.net/95751/us-deported-around-369000-immigrants-in-2013>.

<sup>8</sup> MOLONEY, *supra* note 6, at 3.

<sup>9</sup> *See, e.g.*, individuals who have engaged in acts of terrorism or violating human or international rights may not appeal an order under humanitarian considerations in Canada. Section 64, Immigration and Refugee Protection Act 2001, S.C., c. 64 (Can.) (hereinafter IRPA).

<sup>10</sup> Ronald L. Jepperson, Alexander Wendt & Peter J. Katzenstein, *Norms, Identity and Culture in National Security*, in THE CULTURE OF NATIONAL SECURITY 33 (Peter J. Katzenstein ed., 1996).

<sup>11</sup> Immigration Act 1987, s. 22, 105 (N.Z.).

*Wednesbury* standard of review<sup>12</sup> employed by the courts in immigration appeals, New Zealand's internal human rights commitments and international obligations are significantly impacted, as is evident in the recent High Court opinion *Babulal v. Department of Labour*.<sup>13</sup> In Canada, the 2001 *Immigration and Refugee Protection Act* excludes various classes of individuals for humanitarian appeals and the Supreme Court of Canada recently held that the courts should provide a measure of deference where a particular decision has been allocated by Parliament to an administrative decision-maker rather than to the courts.<sup>14</sup> In the United States ("U.S.") efforts to restrict judicial intervention and review have had a long history; most recently in 2005 when Congress restricted *habeas corpus* review of immigration appeals to the court of appeals.<sup>15</sup>

In Part II, III, and IV of this article we provide a brief overview and discussion of each states immigration policies and relevant laws. In Part V of this article we provide an in depth comparative analysis to these three states immigration policies. Finally in Part VI, we argue that as the scope and content of these humanitarian appeals have narrowed Canada, New Zealand and the U.S. may be unduly infringing upon rights guaranteed by international instruments and domestic constitutional documents.

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<sup>12</sup> *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1947] EWCA Civ 1 (holding, inter alia, that courts will defer to administrative decision-making unless the decision is so unreasonable that no reasonable decision-maker would arrive at that result).

<sup>13</sup> *Yatish Suresh Babulal v. Chief Executive, Department of Labour*, CIV-2011-404-1773.

<sup>14</sup> *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 (Can.).

<sup>15</sup> Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 Conn. L. Rev. 1411 (1997); REAL ID Act, Pub. L. No. 109-13.

## II. CANADA

### A Brief Overview of Canadian Immigration Policy

Canada has increasingly welcomed immigrants over the past several decades. It accepts more immigrants per capita and the highest proportion of foreign-born residents (20.6%) than any other G8 states.<sup>16</sup> It also has a long-standing official policy of supporting multiculturalism having officially embraced “multiculturalism within a bilingual framework” in 1971. This policy, while asserting that Canada had two official languages, observes that there is no official culture, nor does any ethnic group take precedence over another, and helps minority groups to preserve their language and culture.<sup>17</sup> Indeed “Canadianess” is increasingly being defined as incorporating “multiculturalism” within a tolerant and inclusive society.<sup>18</sup>

Such was not always the case. While official government narratives argue that two major constitutional documents, the *Royal Proclamation of 1763* and the *Quebec Act* set the basis for a multicultural social framework that is solicitous to peoples of different cultures, Canadian immigration policy has historically been premised on the recruitment of “desirable” white northern European immigrants and the exclusion of non-white non-European “undesirable” immigrants.<sup>19</sup> Initial immigration laws favoured British and northern European individuals. This was consistent with the nascent formation of Canadian identity as “British North

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<sup>16</sup> Statistics Canada: “Immigration and Ethnocultural Diversity in Canada, National Household Survey, 2011” Online: <http://www.cic.gc.ca/english/multiculturalism/citizenship.asp> (G8 states include France, Germany, Italy, Japan, the United Kingdom, the U.S., Canada and Russia).

<sup>17</sup> See generally, Multiculturalism and Citizenship Canada (1985) *Education: Cultural Pluralism in Canada*, Ottawa: Supply and Services Canada, at 15.

<sup>18</sup> AUGIES FLERAS, THE POLITICS OF MULTICULTURALISM: MULTICULTURAL GOVERNANCE IN COMPARATIVE PERSPECTIVE 56-58 (2009).

<sup>19</sup> GERALD BEAUDOIN & DOROTHY DOBBIE, A RENEWED CANADA: THE REPORT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND THE HOUSE OF COMMONS 28 (1992).

American” and overt Anglo-centrism contraposed against the melting pot of the U.S. immigration policy was overlaid by a strict hierarchy of preferred racial groups which sought to exclude Blacks, Asians and other “races” due to cultural and racial differences and because they were considered “unsuited” to the cold Canadian climate. However, unable to compete with the U.S. and in need of labour (particularly agricultural labour) to develop, Canada expanded recruitment efforts to include immigrants from Eastern Europe while tolerating immigration from Asia and other “non-white” areas. Nevertheless, the underlying justification of “climatic” unsuitability continued to provide conceptual cover for ideas of British/French racial and cultural superiority and reinforced notions that these peoples were non-assimilable.<sup>20</sup> These attitudes were reflected in the law; for example, section 38 of the 1910

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<sup>20</sup> This attitude is evident in statements regarding Canada’s immigration policy in the 1920s, *see, e.g., Canada’s Immigration Policy, in CANADA YEAR BOOK* 165-66 (1930) (“Immigration, which was at a low ebb during the war period, is again increasing and becoming a chief means of reinforcing our population and filling up the vast waste spaces of Canada. But where any considerable immigration into a democratic country occurs, the racial and linguistic composition of that immigration becomes of paramount importance. Canadians generally prefer that settlers should be of a readily assimilable type, already identified by race or language with one or the other of the two great races now inhabiting this country and thus prepared for the assumption of the duties of democratic Canadian citizenship. Since the French are not to any great extent an emigrating people, this means in practice that the great bulk of the preferable settlers are those who speak the English language - those coming from the U.K. or the U.S. Next in order of readiness of assimilation are the Scandinavians and the Dutch, who readily learn English and are already acquainted with the workings of free democratic institutions. Settlers from Southern and Eastern Europe, however desirable from a purely economic point of view, are less readily assimilated, and the Canadianizing of the people from these regions who have come to Canada in the present century is a problem both in the agricultural Prairies Provinces and in the cities of the East. Less assimilable still, according to the general opinion of Canadians, are those who come to Canada from the Orient. On the whole the great bulk of Canadian immigration of the past generation has been drawn from the English-speaking countries and from those Continental European countries where the population is ethnically nearly related to the British, though in recent years there has been an increasing immigration of Slavs.”).

*Canadian Immigration Act* granted the Federal cabinet the power to prohibit the entry “of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada.”<sup>21</sup> As such, certain immigrants were required to pay exorbitant head taxes, denied the franchise, or denied the opportunity to work in certain industries or with white women.<sup>22</sup> At the same time various groups, such as the Chinese, were almost completely banned from immigrating to Canada.<sup>23</sup>

Having increased difficulty justifying blatantly racial-based exclusion policies, which might affect Canada’s international reputation, immigration policy changed after the Second World War. The federal government dramatically overhauled the immigration system while simultaneously providing for Canadian Citizenship in 1946. The *1952 Immigration Act*,<sup>24</sup> premised on the idea immigration should meet the economic development needs and family reunification objectives as well as provide for refugees, nevertheless continued to exclude Asians who had no close relatives already living in Canada, homosexuals, prostitutes, and mentally disordered individuals.<sup>25</sup> It also allowed for quotas on South Asians.<sup>26</sup> Nevertheless, the racist and Anglo-centric aspects of Canadian immigration policy were discarded by 1962.

After 1962 Canada implemented a points system, which sought to address work and skills shortages and gave preferences to certain classes of immigrants. The *Immigration Act, 1976*

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<sup>21</sup> *An Act respecting Immigration*, EARLY CANADIANA ONLINE (1910), available at [http://eco.canadiana.ca/view/oocihm.9\\_07184#oocihm.9\\_07184/15?r=0&s=1&\\_suid=1386665734839040821823483198094](http://eco.canadiana.ca/view/oocihm.9_07184#oocihm.9_07184/15?r=0&s=1&_suid=1386665734839040821823483198094).

<sup>22</sup> JAMES W. ST. G. WALKER, “RACE” RIGHTS AND THE LAW IN THE SUPREME COURT OF CANADA: HISTORICAL CASE STUDIES, ch. 2 (1997).

<sup>23</sup> Lily Cho, *Redress Revisited: Citizenship and the Chinese Canadian Head Tax*, in CANADA: CRITICAL PERSPECTIVES ON THE CULTURE OF REDRESS 87-89 (Jennifer Henderson & Pauline Wakeham eds., 2013).

<sup>24</sup> Canadian History; Immigration Voices at <http://www.canadianhistory.ca/iv/1945-1967/act/>

<sup>25</sup> Immigration Act 1952, s. 5 at Immigration Voices at [http://www.canadianhistory.ca/iv/1945-1967/textwindow/immigration\\_act\\_1952.html](http://www.canadianhistory.ca/iv/1945-1967/textwindow/immigration_act_1952.html).

<sup>26</sup> Canada in the Making, [http://www.canadiana.ca/citm/specifique/immigration\\_e.html](http://www.canadiana.ca/citm/specifique/immigration_e.html).



established three categories for potential immigrants: family class, independent class, and humanitarian class.<sup>27</sup> Family class immigrants were given priority and were provided points for having family members in Canada or were exempt from certain point requirements.<sup>28</sup> The generally more prosperous, entrepreneurial and skilled independent immigrant class was awarded points based on certain characteristics, which were indicative of certain economic needs.<sup>29</sup> The humanitarian class was those individuals whose settlement was considered to be part of Canada's humanitarian obligations under the 1951 *Convention relating to the Status of Refugees*.<sup>30</sup> At the same time, the cabinet was given considerable latitude in easing entrance requirements for refugees, including the creation of "displaced and persecuted" peoples' categories that would not be required to meet normal entrance requirements for refugees. The *Immigration Act, 1976* also gave more power to the provinces to set their own immigration laws and expanded the list of prohibited classes of individuals to include those who might be a burden of social welfare or health services.<sup>31</sup> Later changes in the 1980s and 1990s established a category for "business" immigrants who could invest significant funds in the economy.<sup>32</sup>

### **Immigration and Refugee Protection Act 2001**

Twenty-first century developments included the *Immigration and Refugee Protection Act 2001* (IRPA), which currently sets forth the grounds and appeals protection from

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<sup>27</sup> Immigration Act 1975, ss. 7 & 114.

<sup>28</sup> Alan Simmons, *Immigration and Canada: Global and Transnational Perspectives* (Toronto: Canadian Scholars' Press Inc., 201) at 71-81.

<sup>29</sup> Canadian history: Immigration Voices at <http://www.canadianhistory.ca/iv/1967-Present/overview2.html>

<sup>30</sup> Canada: Parliamentary Information and Research Service, Penny Becklumb, (Canada's Immigration Programme" BP-190E(2008) at 9-14; online: <http://www.parl.gc.ca/Content/LOP/researchpublications/bp190-e.pdf>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

deportation orders, exclusion orders and departure orders.<sup>33</sup> The Act provides for the consideration of humanitarian and compassionate factors in light of all the circumstances of the case on appeal to the Minister under section 25, with a right of judicial review in Federal Court. The Minister is obligated to consider applications made by foreign nationals who are located within Canada but is not obligated to consider applications made by a foreign national located outside of Canada. An appeal under section 25 may be based on humanitarian considerations which take “into account the best interests of a child directly affected” or where “sufficient humanitarian and compassionate considerations warrant special relief [from the removal order] in light of all the circumstances of the case.”<sup>34</sup>

The procedure for a humanitarian and compassionate review is divided into two assessment stages. The first assessment stage is a request from an applicant for an exemption from certain requirements under IRPA or any applicable regulations.<sup>35</sup> The burden of proof is upon the applicant to show that their individual circumstances warrant an exemption.<sup>36</sup> The second assessment stage, which only occurs after a positive first assessment stage, is a determination of whether the applicant will be provided permanent residency.<sup>37</sup> After an initial determination by an immigration officer, an applicant may appeal a negative determination to the Immigration Review Division under sections 63 and 65 of IPRA if the “foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.”<sup>38</sup> Other individuals who are not in the family class or a sponsor may appeal

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<sup>33</sup> Immigration and Refugee Protection Regulations, SOR/2002-227, c. 223 (Can.).

<sup>34</sup> IRPA, c. 67(c).

<sup>35</sup> IPRA, c. 25.

<sup>36</sup> The applicant who “bears the burden of proving any claim upon which he relies” *Owusu v. MCI*, 2004 FCA 38 at para. 5.

<sup>37</sup> Canada: Citizenship and Immigration Canada: IP5 “Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds” Online: <http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf>

<sup>38</sup> IPRA c. 65.

directly to the Federal Court under section 72.<sup>39</sup> However, section 64 of the Act prohibits appeals from certain categories of individuals: Those who have committed serious crimes (defined as a term of imprisonment of at least six months or punishable by a maximum term of at least ten years imprisonment), individuals who have engaged in organized criminality, violated human or international rights or may be a threat to national security and those individuals who have engaged in misrepresentation (unless the sponsored family member is the sponsor's spouse, common-law partner or child).<sup>40</sup>

The judicial appeals process concerns the adequacy of the decisions applying the humanitarian and compassionate factors or evaluating the Minister's determination that certain classes of applicants are excluded from a humanitarian and compassionate appeal. For a determination of whether a ministerial determination is valid, the standard of review for an appeal is reasonableness.<sup>41</sup> A correct decision under this standard is where there is "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."<sup>42</sup> The criteria for determining a humanitarian and compassionate appeal was outlined by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*.<sup>43</sup> They include:

- (1) The seriousness of the offense leading to the removal order;
- (2) The potential of rehabilitation;

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<sup>39</sup> IRPA, c. 72.(1) (stating, "Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.").

<sup>40</sup> IPRA, c. 34, 35, 36 & 37.

<sup>41</sup> *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para. 45 (Can.).

<sup>42</sup> *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para. 47 (Can.).

<sup>43</sup> *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 (Can.).

- (3) The length of time spent and the degree to which the individual has resided in Canada;
- (4) Family and community support available to the person facing removal;
- (5) The impact the removal would have on the family in Canada (if any) and the dislocation to the family that a removal would cause; and
- (6) The degree of hardship that would be caused to the removed individual in his country of nationality.<sup>44</sup>

Other factors include health considerations and lack of critically necessary healthcare and discrimination<sup>45</sup> in the applicant's home country not covered by section 96 or section 97 of IPRA.<sup>46</sup> The Federal Court also noted that applicants must show "unusual, underserved or disproportionate hardship" which must personally affect the applicant in order to sustain a favourable ruling under section 25.

In *Berthoumieux v. Canada (Minister of Citizenship and Immigration)*<sup>47</sup> Roy, J. noted that allegations of "risks made in an application for permanent residence on humanitarian and compassionate grounds (H&C) must relate to a particular risk that is

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<sup>44</sup> *Id.* at paras. 40-41, 90.

<sup>45</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.R. 497, para. 26 (Can.) (citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (Can.) (describing discrimination as "a distinction which intentional or not but based on grounds relating to personal characteristics of the individual or group, has the effect of impos[ing] disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.")).

<sup>46</sup> *IP 5: Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds*, CITIZENSHIP AND IMMIGRATION CANADA, <http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf>.

<sup>47</sup> *Berthoumieux v. Canada (Minister of Citizenship and Immigration)*, [2013] F.C. No. 1301 (Can.).

personal to the applicant” [emphasis in original].<sup>48</sup> As such, generally poor conditions in the applicant’s home state, which affect all individuals in the country do not in and of themselves constitute hardship. An appeal is allowed if the decision being appealed was wrong in law or fact, if there was a breach of a principle of natural justice (for example, a breach to the right to be heard), or if the court determines that the applicant has met the burden of proof regarding the humanitarian and compassionate considerations.

Individuals who are denied the opportunity to apply on humanitarian and compassionate grounds because they fall within an excluded category may also seek judicial review. IPRA prevents those individuals who have engaged in organised criminality, (section 37), the violation of human or international rights (section 35), and an act endangering national security (section 34), as determined by the Minister, from using the humanitarian and compassionate review process.<sup>49</sup> The determination of who fits within a particular category as well as the opportunity of the exercise for ministerial discretion under these heads is also reviewable by the courts. However, the burden upon those excluded by ministerial decision is high and the exemption provisions cannot include factors which might be considered humanitarian factors under section 25.

This is evident in *Agraira v. Canada*, where the Supreme Court gave wide discretion to the Minister in determining whether an individual is a threat to national security and affirmed that humanitarian and compassionate factors could not be used under section 34(2) to obtain an exemption from exclusion based on national security grounds.<sup>50</sup> Agraira, a citizen of Libya was found to be inadmissible on security grounds due to his membership in the Libyan National Salvation Front, which had been classified as a terrorist organization by Citizenship and Immigration Canada.<sup>51</sup>

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<sup>48</sup> *Berthoumieux v. Canada (Minister of Citizenship and Immigration)*, [2013] F.C. No. 1301 at para. 12. (Can.).

<sup>49</sup> IPRA c. 34, 35, & 37.

<sup>50</sup> *Agraira v. Canada*, [2013] S.C.R.36 (Can.).

<sup>51</sup> *Id.* at para. 9.

Agraira argued that the ministerial discretion of rejecting his application for an exemption under 34(2) as a national security risk emphasized public safety and national security factors to the exclusion of other relevant factors under section 34.<sup>52</sup>

The Court observing that the standard of review was reasonableness and that considerable deference was to be accorded the minister, noted that “a court reviewing the reasonableness of a minister’s exercise of discretion is not entitled to engage in a new weighing process.”<sup>53</sup> As such, while the Court agreed that the term “national interest” was broader than simply public security and national defence, it declined to reverse the Ministerial decision as to the finding of a security risk under section 34(1) and a determination of an exemption under section 34(2).<sup>54</sup> Moreover, the Court noted that individual factors that may be relevant to a finding that the individuals continued presence in Canada “is not detrimental to the national interest,” cannot include humanitarian and compassionate factors used under section 25.<sup>55</sup> Thus for these

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<sup>52</sup> Section 34 of IRPA states:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

(b) engaging in or instigating the subversion by force of any government;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest. IRPA, S.C. 2001, c.27. (Can.).

<sup>38</sup> *Id.* at para. 91.

<sup>54</sup> *Id.* at para. 65.

<sup>55</sup> *Id.* at para. 84 (quoting “[B]ecause of the possibility of H&C relief under s. 25 of the IRPA, the principle of consistent expression dictates that H&C factors

excluded individuals, personal or familial humanitarian or compassionate considerations, which may be relevant to ascertain how or why they may have acquired a proscribed membership, engaged in or committed various acts or which could be relevant for determination of their status, can never be considered. In effect, proper status and identity are a condition precedent for the privilege of the humanitarian and compassionate appeals.

The implication is that public safety and national security are privileged considerations under IPRA and that Ministerial discretion is accorded wider latitude in removal determinations where humanitarian and compassionate factors may be relevant is increasingly evident in Canadian removal and exclusion process. IPRA has been amended over the years to expand ministerial discretion and limit the scope of humanitarian appeals while refocusing the immigration law more towards issues of security. This was recognized by the Court in *Medovarski v. Canada (Minister of Citizenship and Immigration)*.

The objectives as expressed in the IRPA indicate an intent to prioritize security. . . . Viewed collectively, the objectives of the IRPA and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.<sup>56</sup>

The 2010 *Balanced Refugee Reform Act* amended IRPA to restrict the right to appeal under section 25 and allowed the Minister to place further restrictions on foreign nationals who have been granted permanent residency on humanitarian and compassionate grounds for public policy considerations.<sup>57</sup> The Act also added a new section [25(1.3)],<sup>58</sup> which specifies that the Minister may not consider factors taken into account during the

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should not be relevant to a determination of what is in the national interest under s. 34(2).”).

<sup>56</sup> *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, para. 10 (Can.).

<sup>57</sup> *Balanced Refugee Reform Act* S.C. 2010, c. 8.

<sup>58</sup> IPRA, c. 25(1.3).

refugee determination process when examining an application on humanitarian and compassionate grounds made by a foreign national, but requires the Minister to consider factors related to the hardships that affect the foreign national applicant. As such, in any application received after June 29, 2010 factors such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment are not considered as part of the humanitarian and compassionate grounds process. Rather, these factors will be considered separately during the refugee protection determination process. The effect of such changes is that the applicant has a restricted factual basis upon which to make a section 25 application.

In 2012, the *Protecting Canada's Immigration System Act* amended IRPA to eliminate access to the Immigration Appeal Division (IAD) for those permanent residents or family class members who receive certain criminal sentences within Canada or who are thought to have committed offences outside of Canada.<sup>59</sup> The Act also expands Ministerial discretion to deny entry to individuals on unspecified "public policy grounds", increases the penalty for misrepresentation from two to five years, entitles Canadian Security Intelligence Service to conduct unrestricted, compelled examinations of anyone making any application under the Act, reduces already limited remedies for persons subject to other findings of inadmissibility, and limits inadmissibility for temporary entrants with inadmissible family members.<sup>60</sup>

The increased security emphasis, facilitated by the increased deference the courts have taken toward ministerial decisions builds on earlier jurisprudence, which limited the application of the *Charter of Rights and Freedoms* (Charter), particularly section 7 as an infringement upon a security or liberty interest in removal cases.<sup>61</sup> Following *Dunsmuir v. New Brunswick*,<sup>62</sup> the Canadian

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<sup>59</sup> Protecting Canada's Immigration System Act, S.C. 2012, c. 17.

<sup>60</sup> S.C. 2012, c. 17

<sup>61</sup> Government of Canada, *Constitution Act, 1982*, JUSTICE LAWS WEBSITE, <http://laws-lois.justice.gc.ca/eng/const/page-15.html> ("S. 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.")



courts have applied a reasonableness standard of review for Immigration Appeals Division decisions and have been deferential to administrative decisions made by the Minister. This deference has been justified by changes in the legislation, practical considerations and separation of power considerations.<sup>63</sup> Removal decisions require “the application of broad policy considerations to the facts as found to be relevant, and weigh for importance” and whether there are sufficient humanitarian and compassionate considerations to warrant relief from a removal order is “a decision Parliament confided to the AID, not to the courts.”<sup>64</sup> Moreover, as pointed out by the Court in *Minister of Citizenship and Immigration v. Khosa*, it extends “not only to facts and policy but to a tribunal’s interpretation of its constitutive statute and related enactments, because “there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal’s decision is rationally supported.”<sup>65</sup>

The deference and policy consideration have extended to constitutional analysis under section 7 of the Charter. This jurisprudence has effectively limited the scope of section 7 to issues of procedural substantive justice without any inquiry into the issue of whether removal in and of itself violates a protected liberty interest.<sup>66</sup> The Court in *Medovarski v. Canada per McLachlin, C.J.*

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(Unsuccessful charter challenges have been made under s. 11(h) (right not to be tried and punished for same offense twice), s. 12 (right not to be subjected to cruel and unusual punishment), s. 15 (equal protection and benefit of the law) as well as s. 7). See Daniela Bassan, *The Canadian Charter and Public International Law: Redefining the State’s Power to Deport Aliens*, 34 Osgoode Hall L. J. 3, 583, 595-600 (1996).

<sup>62</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. (Court to apply reasonableness standard “[w]here the question is one of fact, discretion or policy, deference will usually apply automatically”) *Dunsmuir* at para. 53.

<sup>63</sup> *Minister of Citizenship and Immigration v. Khosa*, [2009] 1 S.C.R. 339, para. 4 (Can.).

<sup>64</sup> *Id.* at para. 4.

<sup>65</sup> *Id.* at para. 25.

<sup>66</sup> *Chiarelli v. Canada*, [1992] 1 S.C.R. 711, para. 27 (Can.) (Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in

observed that “[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada.”<sup>67</sup> The Court added: “Thus the deportation of a non-citizen *in itself* cannot implicate the liberty and security interests protected by s. 7.”<sup>68</sup> As such, while the Court has found that certification of security threats have offended procedural fundamental justice under section 7,<sup>69</sup> the Charter protections in these cases are essentially procedural, and the underlying policy impetus, reflected in the common law remains important. For example, in *Chiarelli v. Canada* the court noted that in order to determine “the scope of principles of fundamental justice” in deportation cases as they might apply to the particular facts, “the

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Canada. It has done so in the Immigration Act....The qualified nature of the rights of non-citizens to enter and remain in Canada is made clear by s. 4 of the Act... One of the conditions Parliament has imposed on a permanent resident's right to remain in Canada is that he or she not be convicted of an offence for which a term of imprisonment of five years or more may be imposed. This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country. The requirement that the offence be subject to a term of imprisonment of five years indicates Parliament's intention to limit this condition to more serious types of offences. It is true that the personal circumstances of individuals who breach this condition may vary widely.... However there is one element common to all persons who fall within the class of permanent residents described in s. 27(1)(d)(ii). They have all deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident, deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of a deliberate violation of the condition imposed by s. 27(1)(d)(ii) is sufficient to justify a deportation order. It is not necessary, in order to comply with fundamental justice, to look beyond this fact to other aggravating or mitigating circumstances).

<sup>67</sup> *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, paras. 10, 46 (Can.) para. 46.

<sup>68</sup> *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, paras. 10, 46 (Can.) (emphasis added).

<sup>69</sup> *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (Can.).

court must look to the principles and policies underlying immigration law.”<sup>70</sup>

### III. NEW ZEALAND

#### **A Brief Overview of New Zealand’s Immigration Policy<sup>71</sup>**

*The Economist* has recently ranked New Zealand as the fifth most democratic State in its annual democracy index.<sup>72</sup> Human rights and civil liberties are supported by statutory and common law protections such as the *Human Rights Act 1993*, judicial review of executive action, natural justice and international human rights conventions. New Zealand’s *Human Rights Act 1993* is designed to protect fundamental human rights “in general accordance with United Nations Covenants or Conventions on Human Rights” and has been accorded “special status” by the courts.<sup>73</sup> The courts have recognized that such human rights guarantees shall guide the determinations of New Zealand’s many statutory tribunals, including the Immigration and Protection Tribunal (IPT) and potentially any decision of a public nature.<sup>74</sup> New Zealand courts have also held that international treaty obligations and principles of customary public international law impose extra-legal restraints.<sup>75</sup>

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<sup>70</sup> *Chiarelli v. Canada (Employment and Immigration)*, [1992] 1 S.C.R. 711, para. 734 (Can.).

<sup>71</sup> See Fadgen and Charlton, 2012(43) VUWLR.

<sup>72</sup> *Democracy index 2012 Democracy at a Standstill: A Report from The Economist Intelligence Unit*, THE ECONOMIST (2013), available at [https://portoncv.gov.cv/dhub/porton.por\\_global.open\\_file?p\\_doc\\_id=1034](https://portoncv.gov.cv/dhub/porton.por_global.open_file?p_doc_id=1034).

<sup>73</sup> *Dir. of Human Rights Proceedings v N.Z. Thoroughbred Racing Inc.* [2002] 3 NZLR 333 (CA) 339 Elias CJ for the Court.

<sup>74</sup> *Royal Australasian Coll. of Surgeons v Phipps* [1999] 3 NZLR 1 (CA); *O’Leary v Health Funding Auth.* [2001] NZAR 717 (HC).

<sup>75</sup> See e.g. *Puli’uvea v Removal Review Auth.* (1996) 14 FRNZ 322 (CA) 331 (finding courts will “strive to interpret legislation consistently with the treaty obligations of New Zealand.”); *N.Z. Airline Pilots Ass’n Inc. v Attorney-General* [1997] 3 NZLR 269 (CA) 289 (finding such obligations are viewed

These general human rights principles have not, however, always enjoyed such an expansive application within the immigration context. The common law has recognised this broad power. As noted by Cooke J, “[i]mmigration is a subject linked with foreign policy [and] . . . [i]n that sense it falls within a sphere where the Courts are very slow to intervene.”<sup>76</sup> International norms and institutions have also had an effect, but domestic politics and liberal democratic norms as articulated within the domestic polity have had the paramount impact on national migration control policy and law.<sup>77</sup> As such, the decisional efficacy of humanitarian considerations on administrative and judicial decision-making, while informed by international law, generally remains wedded to domestic conceptions of what is “humanitarian.”

New Zealand, settled by a predominately British population, developed a migration policy dominated by economic, and to a lesser extent racial and social, considerations. After World War II the Government accepted the recommendation of the Dominion Population Commission that immigration (including government sponsored immigration from the United Kingdom and Northern Europe) could be used to fill jobs in secondary and tertiary industries that could not be staffed by the current workforce.<sup>78</sup> In 1960 additional changes were made to staff essential industries. The economic arguments in favour of increased immigration often clashed with the widely subscribed notion that New Zealand wished to remain “British” and “non-Asian”.<sup>79</sup> From 1920 onward this policy provided that all individuals who were not “of British birth

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"whether or not the legislation was enacted with the purpose of implementing the relevant text.").

<sup>76</sup> *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) 226 Cooke J for the Court.

<sup>77</sup> Virginie Guiraudon & Gallya Lahav, *A Reappraisal of the State Sovereignty Debate: The Case of Migration Control*, 33 Comp. Pol. Stud. 163, 164 (2000).

<sup>78</sup> *Dominion Population Committee: Report of the Dominion Population Committee*, AUSTL. J. OF HUMAN RIGHTS 17, 21–22 (1946).

<sup>79</sup> MALCOLM MCKINNON, IMMIGRANTS AND CITIZENS: NEW ZEALANDERS AND ASIAN IMMIGRATION IN HISTORICAL CONTEXT 36–43 (1996).

or parentage” were required to have an “entry permit.”<sup>80</sup> Under the system permits were difficult to attain for non-British Europeans but were “virtually unattainable by non-Europeans” except in the uncommon instance where the Minister decreed that a certain number be issued.<sup>81</sup> Where there were exceptions to the non-European policy it was usually in favour of Pacific Islanders, the great majority of whom came from New Zealand-controlled territories. This racially discriminatory system was reaffirmed in the *Immigration Act of 1964*.<sup>82</sup> The racial bias in the migration law did not escape notice from other States and was increasingly viewed by the public as antithetical to New Zealand’s international obligations and liberal values. In 1987 the Government eliminated the last official vestiges of the implicit “White New Zealand” immigration policy by removing the preferences given to “traditional source countries” of Great Britain, Northern Europe and North America.<sup>83</sup> New Zealand’s current immigration policy consists of three main categories: economic migrants (those individuals who have certain skills, occupations, entrepreneurial or business capacities), migrants who are admitted under family reunification rules and those admitted on humanitarian grounds.

While domestic considerations remain paramount in migration policies and law, international norms and obligations have been increasingly influential since World War II. As mentioned above New Zealand generally restricted entry to persons of British or Irish parentage prior to World War II, but after the War international norms concerning the plight of displaced persons and refugees (due to the egregious human rights violations during the fighting and the Holocaust) became increasingly salient. Humanitarian considerations started to be considered alongside

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<sup>80</sup> Sean Brawley, *No 'White Policy' in NZ: Fact and Fiction in New Zealand's Asian Immigration Record, 1946–1978*, 27 N.Z. J. OF HIST. 16, 19 (1993).

<sup>81</sup> *Id.*

<sup>82</sup> Kerry Burke, *Review of Immigration Policy, August 1986*, AUSTL. J. OF HUMAN RIGHTS 42 (1986).

<sup>83</sup> The Immigration Act 1987 (NZ).

economic and country of origin criteria.<sup>84</sup> Initially, these humanitarian considerations focused on refugees displaced by the conflict in Europe. After the War, the Government accepted 4,582 displaced European refugees as well as displaced persons who arrived on International Refugee Organisation ships.<sup>85</sup> In 1956 it agreed to a quota of 1,000 (later increased to 1,300) Hungarian refugees following the aborted anti-communist revolution.<sup>86</sup> Section 40 of the *Immigration Act 1964* reinforced the growing humanitarian element in migration decisions in statute when it stated: "Nothing in this Act shall affect the prerogative of mercy." This led to the practice where individuals who were subject to deportation would petition the Governor-General for a pardon, removing the underlying conviction that led to the deportation order.<sup>87</sup>

As part of this general move toward including international legal considerations in migration decisions, New Zealand ratified the *Convention relating to the Status of Refugees* in 1960, the *International Convention on the Elimination of All Forms of Racial Discrimination* in 1972, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) in 1978 and the *United Nations Convention on the Rights of the Child* (UNCROC) in 1993.<sup>88</sup> These international obligations extended human rights and

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<sup>84</sup> YUCEF BOUANDEL, *HUMAN RIGHTS AND COMPARATIVE POLITICS* (1997); Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUMAN RIGHTS Q. 703 (1997).

<sup>85</sup> New Zealand Parliament "Immigration chronology: selected events 1840-2008" (Apr. 14, 2008) Parliamentary support: Research papers <[www.parliament.nz](http://www.parliament.nz)>.

<sup>86</sup> *Id.*

<sup>87</sup> K.J. Keith, *Administrative Law Developments in New Zealand as Seen Through Immigration Law*, in INSIDE AND OUTSIDE CANADIAN ADMINISTRATIVE LAW: ESSAYS IN HONOUR OF DAVID MULLAN, 125, 128 (Huscroft & Michael Taggart eds., 2006).

<sup>88</sup> Convention relating to the Status of Refugees 189 U.N.T.S. 137 (opened for signature 28 July 1951, entered into force 22 April 1954); International Convention on the Elimination of All Forms of Racial Discrimination 660 U.N.T.S. 195 (opened for signature 21 December 1965, entered into force 4 January 1969); International Covenant on Economic, Social and Cultural Rights

non-discriminatory protections to those seeking to enter the country when they had a well-founded fear of persecution, and provided that the appropriate due process and humanitarian considerations be accorded individuals gaining access to or being removed from New Zealand, regardless of the applicants' irremediable characteristics.

These international obligations are embedded in the *Immigration Act 2009*. The Act specifically incorporates New Zealand's international obligations under the *United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and the *International Covenant on Civil and Political Rights* (ICCPR); which now includes the category of "protected person" alongside "refugee" in the determination of deportation liability.<sup>89</sup> The international legal instruments include protections for those individuals who can establish "substantial grounds for believing that [they] would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."<sup>90</sup> Consideration of both the substantive and procedural requirements of these instruments is mandatory when determining the validity of a migrant's claims to be a refugee or a protected person as well as in the deportation of such persons.<sup>91</sup> Moreover, the Act permits a deportation order quashed where an individual can demonstrate personal circumstances covered by "relevant" international obligations.<sup>92</sup>

As international law was being reconceptualised from a body concerned with the rights of States *inter se* to one where individuals are recognised as having certain rights, there were parallel domestic developments in the law regarding the rights of immigrants and aliens. Prior to 1980 "aliens" had no right to be in the country except by approval of the Crown; there were few if any

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993 U.N.T.S. 3 (opened for signature 19 December 1966, entered into force 3 January 1976) [ICESCR]; United Nations Convention on the Rights of the Child 1577 U.N.T.S. 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC].

<sup>89</sup> International Covenant on Civil and Political Rights (ICCPR), ss. 129–131

<sup>90</sup> Immigration Act 2009, c. 131(1).

<sup>91</sup> *Id.*, at s. 164.

<sup>92</sup> *Id.*, at s. 177.

protections for revocations of permits and immediate removal for aliens who did not have permission to be in the country. For example, the Court in *Pagliara v. Attorney-General*, which considered the issue of whether an alien who had been convicted of a crime would be entitled to a hearing concerning his deportation, noted (quoting Lord Denning):

But in the case of aliens, it is rather different; for they have no right to be here except by licence of the Crown. And it has been held that the Home Secretary is not bound to hear representations on their behalf, even in the case of a deportation order, though, in practice, he usually does so.<sup>93</sup>

After 1980 the courts gradually extended procedural protections to migrants. In *Daganayasi v. Minister of Immigration* the Court held that a decision by the Minister to deport Daganayasi was invalid because the Minister had not allowed the appellant a chance to see or respond to a medical report which created an incorrect impression that there would be little risk to the appellant's child should he be forced to leave New Zealand with his parents.<sup>94</sup> This case signaled a fundamental shift in attitudes towards migrants. The general trend toward greater procedural protections was encouraged by the *Bill of Rights Act 1990*, which affirms the right of every person "to the observance of the principles of natural justice" in any administrative decision.<sup>95</sup> The section was extended to the migration context when the Crown accepted that the section 27 natural justice provisions applied to migrants in *Attorney-General v. Udompun*.<sup>96</sup> Subsequently the court of appeal extended the procedural rights accorded to potential deportees' citizen children who would be affected by a deportation order.<sup>97</sup> These considerations include addressing the fact that a citizen child's

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<sup>93</sup> *Pagliara v Attorney-General* [1974] 1 NZLR 86 (SC) 94 (quoting *Schmidt v Secretary of State* [1969] 1 All ER 904 (CA) 908–909).

<sup>94</sup> *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA).

<sup>95</sup> Bill of Rights Act (1990) (NZ) at s. 27(1)(a).

<sup>96</sup> *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA).

<sup>97</sup> *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596; *Huang v Minister of Immigration* [2008] NZCA 377, [2009] 2 NZLR 700.



different status in his or her parents' home country may adversely impact or subject them to discrimination.<sup>98</sup>

### **Deportation in New Zealand Law**

Deportation orders are issued under Part 6 of the *Immigration Act 2009* by the Minister of Immigration or Governor-General when a non-citizen threatens national security or is convicted of certain criminal offences. The deportation provisions were designed in light of the Act's overall objective to "better balance efficiency with fairness"<sup>99</sup> in immigration matters and to "manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals,"<sup>100</sup> while "implementing specified-related international obligations."<sup>101</sup>

Under the Act an aggrieved party may appeal to the Immigration Protection Tribunal (IPT) on a question of fact under section 201 or on humanitarian grounds under section 206. A person must file a humanitarian claim within the relevant time period specified by the Act, (which depends upon the liable deportee's immigration status) and may not file an appeal where the individual has already "had a humanitarian appeal heard by the Tribunal in relation to a claim or a subsequent claim."<sup>102</sup> The grounds used by the IPT to evaluate a humanitarian appeal are set out in section 207 of the Act. The appeal must be allowed and the deportation order quashed if the IPT is satisfied that "there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh" for the appellant to be deported from New Zealand and "it would not in all the circumstances be contrary to the public interest to allow" the individual to remain in

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<sup>98</sup> *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [60]–[61].

<sup>99</sup> *Immigration Act 2009: Summary of Key Changes* I MMIGRATION NEW ZEALAND (Dec. 2010), [www.immigration.govt.nz](http://www.immigration.govt.nz).

<sup>100</sup> Immigration Act 2009, c. 3 (N.Z.).

<sup>101</sup> *Immigration Act 2009*, *supra* note 90.

<sup>102</sup> Immigration Act 2009, c. 206(3)(b) (N.Z.).

New Zealand.<sup>103</sup> The appellant, while not carrying the burden of proof [contrary to the situation in Canada], has the responsibility to place material before the IPT which, if accepted, would allow the order to be quashed.<sup>104</sup>

Doug Tennent, a lecturer at the University of Waikato, noted that the section 207 “unjust or unduly harsh” balancing test was the “highest of all thresholds” used in humanitarian appeals under the *Immigration Act 1987*, and it is clear that the test is a high bar to a successful humanitarian appeal.<sup>105</sup> Generally, the “unjust” portion of the test refers to the unfairness and the negative impact the requirement to leave would have on the person given the time the person has spent in New Zealand and the commitment the individual (work, social intercourse, wealth generation activities) has shown to the country. The “unduly harsh” aspect of the test refers to the impact deportation would have on family members and on those to whom the liable deportees are emotionally close.

The determination of these factual issues is complicated by several additional factors. First, precisely what qualifies as a “humanitarian” ground is not defined in the Act nor fully elucidated in case law. It is clear that the suffering and dangers to life which led to the enactment of the Convention relating to the Status of Refugees, and the CAT, are “humanitarian” issues, as are such circumstances as the effects of family separation for families and children who have some members who have the right to stay in New Zealand. In addition, circumstances such as the existence of physical or mental infirmity, mental illness, where a person would be prejudiced or otherwise adversely affected by his or her race, ethnic origin, religion, nationality, sex or other status, or for their political opinions, or for an offence of a political character, may be considered.<sup>106</sup>

These factors are not in themselves determinative but the material nature of a “humanitarian” factor in the test is dependent

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<sup>103</sup> *Id.* c. 207.

<sup>104</sup> *Faavae v Minister of Immigration* [2000] NZAR 177 (CA).

<sup>105</sup> DOUGLAS TENNENT, IMMIGRATION AND REFUGEE LAW 290 (2010).

<sup>106</sup> *Bujak v The Minister of Justice* [2009] NZCA 570 (SC).

upon the individual circumstances and the context.<sup>107</sup> However, where the impact on a potential deportee goes beyond the relatively narrow compass of a “well-founded” fear of physical harm or persecution, the humanitarian nature of a particular factor or status within a particular context is difficult to ascertain, and can often be an issue of semantics rather than legal standards or principles. As noted by Tipping J. in *Ye v. Minister of Immigration*:

Article 3(1) [of the United Nations Convention on the Rights of the Child] provides that in all actions concerning children, by public and administrative authorities, the best interests of the child shall be “a primary consideration”. A primary consideration does not mean *the* primary consideration, much less the paramount consideration. There is no basis for reading in, as the appellants argued, the Care of Children Act 2004 standard of “first and paramount consideration”. That would not be consistent with the policy objectives which must be reconciled in cases of the present kind. . . . The Care of Children Act is not concerned with immigration matters in respect of which the Immigration Act states the relevant policies.<sup>108</sup>

Second, these humanitarian grounds must be of an “exceptional” nature. As such, the usual impacts of physical and mental health, and those suffered by families who have members who are subject to deportation cannot be humanitarian “concerns” which the test may consider to allow for a successful appeal. As the Supreme Court has observed:

The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found

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<sup>107</sup> *Minister of Immigration v Al-Hosan* [2008] NZCA 462, [2009] NZAR 259 (HC).

<sup>108</sup> *Ye v Minister of Immigration* [2008] NCZA 291, [2009] 2 NZLR 596 at [24]; see also *Tipping J. Puli'uvea v Removal Review Authority* [1996] 14 FRNZ 332 (CA).

in overstayer cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.<sup>109</sup>

The high and relatively amorphous standard under section 207 of the *Immigration Act 2009* is a significant change from the 1987 Act. In addition to the “unjust or unduly harsh” evaluation, the 1987 Act outlined a set of criteria to assist the appeals tribunal and the courts in determining the quality and scope of the humanitarian concerns of the deportee.<sup>110</sup> These factors did not preclude the Tribunal from considering other factors but gave a structure to the inquiry while setting a minimum standard for judicial review.<sup>111</sup> Sections 22 and 105 of the *Immigration Act 1987*, while using the same “unjust or unduly harsh” test carried over into the 2009 Act, but the set of criteria established in section 22(6) by the 1987 Act was not in the subsequent legislation. Hence, in place of the seven-prong requirements of inquiry under the *Immigration Act 1987*, the 2009 Act merely requires a balance of the individual interest (exceptional humanitarian concerns resulting in an injustice or unduly harsh outcome beyond mere repatriation but not to the level of those faced by a refugee or protected person) and the community’s interest, to permit the individual’s continued presence

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<sup>109</sup> *Ye v Minister of Immigration* [2008] NZCA 29, [2009] 2 NZLR 596 at [34] (footnote omitted).

<sup>110</sup> Immigration Act 1987 (N.Z.), c. 22.6. These factors include:

- (a) the appellant's age;
- (b) the length of the period during which the appellant has been in New Zealand lawfully;
- (c) the appellant's personal and domestic circumstances;
- (d) the appellant's work record;
- (e) the nature of the offence or offences of which the appellant has been convicted and from which the liability for deportation arose;
- (f) the nature of any other offences of which the appellant has been convicted;
- (g) the interests of the appellant's family; and
- (h) such other matters as the Tribunal considers relevant (see s 2).

<sup>111</sup> See generally *Al-Hosan v Deportation Review Tribunal* [2007] HC Auckland CIV 2006-404-3923; *Minister of Immigration v Al-Hosan*, [2008] NZCA 462, [2009] NZAR 259 (HC).

in New Zealand.<sup>112</sup> The community interest can be understood as the public interest in the deportation of the individual given the seriousness of the conviction and the likelihood of reoffending (for example, issues of social cohesion, public confidence, deterrence and repugnance of the public to the particular offence).

Despite the narrow scope necessitated by section 207 in the humanitarian appeal and the deportation process, there are international obligations, which can inform both the admission and removal of individuals in the appeals process under the Act. The Act specifically incorporates New Zealand's international obligations under both the CAT and the ICCPR while enacting the international law category of "protected person" alongside the previously enacted category of "refugee." In addition, the Act consistently makes reference to "international obligations" which should be considered by immigration officials when making determinations on deportation orders. Section 177, which allows for a deportation order to be quashed, specifically mentions "international obligations." Under the section, an immigration officer may cancel a deportation order at his or her "absolute discretion" where a "person provides information to the officer concerning his or her personal circumstances" and "the information is relevant to New Zealand's international obligations."<sup>113</sup> While there is no right of appeal under this section, nor is the officer required to act on any information offered, the officer must, if exercising his or her discretion to cancel an order "have regard to any [relevant] international obligations", whether the consideration is at the prospective deportee's behest or not.<sup>114</sup> The officer is not bound to issue any written justification for a decision under section 177(4)(a), but is "obliged to record [. . .] a description of the international obligations; and [. . .] the facts about the person's personal circumstances" wherever the officer has "regard to any international obligations".<sup>115</sup> Presumably, the record or summation

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<sup>112</sup> Immigration Act 2009 at s. 207.

<sup>113</sup> *Immigration Act 2009* (N.Z.), ss 177(1), 177 (2).

<sup>114</sup> *Id.* at ss. 177; 175(5),

<sup>115</sup> *Id.* at 175(5).

made at this juncture is carried forward in any later appeal of the deportation order. It does however raise the spectre of more informed or knowledgeable officers taking a greater proactive approach in applying “international obligations” to individuals presenting relevant grounds for official consideration.

In addition to the explicit international obligations mentioned in the Act, the courts have in certain instances read in other international obligations created by the Government. First, the courts, where not explicitly precluded from doing so, “should strive to interpret legislation consistently with the treaty obligations of New Zealand.”<sup>116</sup> Second, where the treaty obligation has not yet been incorporated into statute but where the principles and rules reflect fundamental common law values and the rights outlined in the Bill of Rights Act 1990 (NZBORA) the courts will apply a presumption of consistency.<sup>117</sup> In *Zaoui v. Attorney-General (No 2)* the Supreme Court held that the presumption of consistency in favour of international obligations provided for certain substantive and procedural requirements within the context of the *Immigration Act 1987*.<sup>118</sup> Nevertheless, the extent to which courts are to include international norms or interpret statutes consistently with international obligations – particularly those international obligations which have not been directly incorporated into domestic law – remains largely unresolved. However, the issue highlights the differential impacts of diverse interpretive approaches where courts are seeking to reasonably balance the protected rights in light of subsequent statutory language infringing upon those rights.

After a determination of deportation liability there may be an appeal to the courts. The judicial review authority in immigration cases exists regardless of the extent of the discretionary power the executive branch exercises in a particular decision. There are two types of review: an appeal on a point of law

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<sup>116</sup> *Puli'uvea v Removal Review Auth.* [1996] 14 FRNZ 322 (CA). See also *Puli'uvea v Removal Review Auth.* [1996] 3 NZLR 538 (CA) 542.

<sup>117</sup> Michael Taggart, *Rugby, The Anti-apartheid Movement, and Administrative Law*, in PUBLIC INTEREST LITIGATION: THE NEW ZEALAND EXPERIENCE IN INTERNATIONAL PERSPECTIVE 82 (Rick Bigwood ed., 2006).

<sup>118</sup> *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 577 (SC).

and judicial review. An appeal on a point of law argues that the substantive and procedural law relating to the case have been incorrectly interpreted or applied. Judicial review concerns whether the decision has been reached in a manner that is in accordance with the law in a fair and reasonable manner.<sup>119</sup>

Prior to the passage of the 2009 Act the scope of review was limited. However the incorporation of international obligations, the congruence of many substantive and procedural rights claimed in migration proceedings with fundamental common law rights, and rights guaranteed by the NZBORA had seemingly pushed the courts to observe a more assertive stance and exacting standard of review. For example, Baragwanath J. in *Ding v. Minister of Immigration*

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<sup>119</sup> *Wolf v Minister of Immigration* (2004) HRNZ 469 (HC); TENNENT, *supra* note 105, at 296. "A hard-look approach or heightened level of intensity of review is appropriate, but even on a *Wednesbury* analysis the immigration officer acted unreasonably and irrationally": *Bugdaycay v Sec'y of State for the Home Dep't* [1987] 1 AC 514 (HL) 531 per Bridge LJ; *R (Mahmood) v Sec'y of State for the Home Dep't* [2001] 1 WLR 840 (CA) 18; *Pharm. Mgmt. Agency Ltd. v Roussel Uclaf Austl. Pty Ltd.* [1998] NZAR 58 (CA) 66; *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [54] per Keith J and 116 per Blanchard J (with Richardson J agreeing at 179; *R (Daly) v Sec'y of State for the Home Dep't* [2001] 2 AC 532; and *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA) 554 per Thomas Bingham MR. The level of intensity depends upon the nature of the right being interfered with: the more fundamental the right the higher the intensity of review. The right at issue here is the right of a child to be looked after by its natural parents, which is an important right even if not protected by the New Zealand Bill of Rights Act [NZBORA]. The NZBORA is not an exhaustive statement of rights (s 28). Article 3(1) of the UNCROC and arts 17, 23 and 24 of the International Covenant on Civil and Political Rights [ICCPR] place the rights and interests of a child as rights and interests of the highest order. The circumstances of this case, which involve the separation of children (who are New Zealand citizens) from their parent and guardian, call for "anxious scrutiny" and the highest intensity of review. Intensity of review of the ss 54 and/or 58 decisions depends upon the whole context (*R (Daly) v Sec'y of State for the Home Dep't*, [2001] UKHL 26 at 548). The whole context includes the best interests of the children who are either about to be removed from their country of citizenship or who are about to have their mother removed from them. The context is not limited by the existence and language of s 47(3) of the Immigration Act 1987. *Ye v Minister of Immigration*, [2008] NZCA 291 at [111–112].

advocated a higher level of scrutiny in those immigration cases where a child might be adversely affected:

The Crown is right in its argument that the state interest in immigration control means that it is an area in which courts traditionally show great deference to the policy of the Executive. But to maintain *in cases of risk to a citizen child* a bare *Wednesbury* standard of whether the decision-maker took that consideration into account but without awareness of the consequences to the child of an adverse decision, however appropriate for a child who is an alien, is difficult to reconcile with the concurrent Crown obligation of protection of the citizen child. To accept such low level intensity of review is equally difficult to square with the Courts' *parens patriae* role in relation to citizen children.<sup>120</sup>

However, the elimination of the humanitarian tests in sections 105 and 22 of the 1987 Act as well as the procedure set out in section 171 to quash a deportation order has re-entrenched a more limited standard of review and has potentially severely circumscribed the ability of the courts to review migration decisions, particularly in light of humanitarian and human rights issues. The effects of these changes, particularly the elimination of the seven-pronged humanitarian test in the 2009 Act, are evident in the recent decision by Lang J. in *Babulal v Chief Executive Department of Labour*.<sup>121</sup> Lang J. notes that a low *Wednesbury* standard of review is not new in immigration cases<sup>122</sup> and observes that section 177 was enacted “as a direct legislative response to [ . .

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<sup>120</sup> *Ding v Minister of Immigration* (2006) 25 FRNZ 568 (HC) 260. See also TENNENT, *supra* note 105, at 298–301.

<sup>121</sup> *Yatish Suresh Babulal v. Chief Exec. Dep't of Labour* CIV-2011-404-1773.

<sup>122</sup> *Id.* at 37. See also Huang v Minister of Immigration, above n 27, at [67] per William Young J:

“... the Court should ensure that the best interests of an affected child were genuinely taken into account as a primary consideration but, beyond that, how conflicting considerations are weighted is for the decision maker and not the court unless unreasonableness considerations can be successfully invoked.



..]Ye [. . .] and *Huang*” and stands for the proposition that an immigration officer is no longer under any obligation “to have regard to the humanitarian grounds” set forth in section 207.<sup>123</sup>

Lang J. continues to hold that the highly deferential *Wednesbury* reasonableness standard is a sufficient standard of review and explicitly rejects Babulal’s request that the Court employ the “hard look” approach due to the probable “severe impact [. . .] [on] Babulal’s daughters.”<sup>124</sup> First, Lang J. rejects the “hard look” argument because the wording of section 177 gives expansive discretion to the executive. He notes that there is no right to apply for a cancellation order and “no obligation to have regard to the humanitarian grounds”<sup>125</sup> when making a decision (or non-decision) under the section. Further, the immigration officer is under no obligation to provide reasons for *not* cancelling a deportation order unless the officer “has had regard to New Zealand’s international obligations.”<sup>126</sup> However rather than a detailed explanation and analysis of a section 177 decision, this requirement, in Lang J’s view, simply calls for “description of the [international] obligations” and a recording of “facts about the personal circumstances of the person subject to the order.”<sup>127</sup> There is no “obligation to give reasons for his or her decision.”<sup>128</sup> Second, the procedure requires that the officer supply a restricted amount of information relating only to the relevant international obligations when making a record of the decision. This restricted information enables only the barest *Wednesbury* scrutiny:

[W]here an immigration officer makes a decision that requires him or her to have regard to New Zealand’s international obligations, Parliament intended the record of the decision to contain sufficient information to allow the decision to be judicially reviewed within a very narrow compass. It

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<sup>123</sup> *Yatish Suresh Babulal*, CIV-2011-202-1733 at 20.

<sup>124</sup> *Id.* at 24.

<sup>125</sup> *Id.* at 20 & 28.

<sup>126</sup> *Id.* at 28.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 33.

accepted that the court must have sufficient information to be able to determine whether the immigration officer who made the decision took into account the international obligations relevant to the particular case. The requirement to record the facts relating to the personal circumstances of the person subject to the deportation order also provides the court with the ability to determine whether the ultimate decision was reasonable in a *Wednesbury* sense, but no more than that.<sup>129</sup>

Third, the failure to mention particular “international obligations” that an officer must have regard to when choosing *not* to quash the order, as well as the elimination of any humanitarian requirement and seven-pronged test in the new statute, limits the ability of the court to undertake a “hard look” review of the decision for material errors of law because there is little law or facts “there” to review. Lang J. acknowledges that an attempt to totally fetter judicial review of an administrative decision must be read down, but that in this case “judicial review [. . .] [is] based on an alleged failure by an immigration officer to have regard to New Zealand’s international obligations when reaching his or her decision.”<sup>130</sup> However, the salient aspect of the statute is the absence of statutory language that might provide for stricter scrutiny:

The absence of any requirement to give reasons tells against an expectation by Parliament that the decision will be subject to close scrutiny by the courts, because a lack of reasons will virtually inevitably compromise such an undertaking. As a result, even if the court wished to take a “hard” or “anxious” look at such a decision, it would struggle to do so.<sup>131</sup>

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<sup>129</sup> *Yatish Suresh Babulal*, CIV-2011-202-1733 at 36.

<sup>130</sup> *Id.* at 31.

<sup>131</sup> *Id.* at 32.

The upshot of this is that judicial review of a decision under section 177 is necessarily minimal, regardless of the humanitarian or international obligations arguments put forward. Since Parliament chose not to require a specific justification under section 177, Lang J. held that there was little necessary documentation to review the decision.<sup>132</sup> For Lang J., the standard immigration officer's consideration record need amount to little more than a docket list of documents containing humanitarian concerns and an incongruous index to "international obligations" to which the official has had regard, concluding with a note that the officer is "not obliged to provide reasons" for his decision upholding the deportation order.<sup>133</sup> Likewise the Court is not required to scrutinise the list when it looks, on balance, to be in order. As a result, Babulal's deportation is reasonable and his appeal dismissed.

This raises a major problem, because the Court's supposed knowledge, comes without a record and without resorting to a "hard look" analysis. Moreover, the relevant obligations are unlikely reasonably interpreted when there is only a (non-exclusive) summary of the factors used in the decision. In effect, the *Wednesbury* standard under the circumstances leaves little, if any, room for the court to review the efficacy of international obligations in the particular circumstances. The test, as set forth in *Babulal* simply requires an executive listing of some international obligations and personal circumstances. There is no judicial inquiry, (nor can there be given the paucity of information), into whether or how the obligations or personal circumstances were considered. The resultant decision will always be "reasonable" under *Wednesbury* since the ultimate test is the mere balancing of probabilities between the public interest in permitting the proposed deportee to remain and the international obligations or humanitarian factors under consideration.

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<sup>132</sup> *Id.* at ¶ 35.

<sup>133</sup> *Immigration Act 2009 s. 177 3(b)(1)*.

#### IV. UNITED STATES:

##### **Overview of U.S. Immigration and Removal Policy**

A common approach to the study of U.S. immigration is to view the development of the immigration system into four historical periods.<sup>134</sup> The first period, from 1789-1874 was a period of relatively unrestricted entry to the U.S. and limited grounds for deportation. The second period, from 1875-1917, was marked by both tighter controls on who could legally enter the U.S. as well as an expansion of grounds for expulsion. There were also two important attributes to this second period: a sharp rise in immigration to the U.S. and a shift from state-based immigration policies to Federal supremacy.<sup>135</sup> An even more rigorously controlled immigration context emerged during World War I and later with the Red Scare (and Palmer Raids) in 1919-1920. This period also witnessed the creation of the U.S. Border Patrol in 1924.<sup>136</sup> These controls were lessened, however, between 1941 and 1980, largely in response to the displacement of individuals during the Second World War and the following Cold War. A restrictive turn in immigration policy re-emerged with the election of Ronald Reagan as U.S. president in 1980. After several years of congressional bargaining over immigration law reforms, the *Immigration Reform and Control Act 1986* (IRCA) was adopted. Among other things, the law sought both to provide sanctions to employers knowingly employing undocumented workers, largely from Mexico, and move towards legalizing many undocumented workers.

The power to remove or deport aliens has a long history in the U. S. Generally the classes of those considered “undesirable” has grown more numerous. Along with these developments, a set of regulatory and legal standards have arisen, which accords a large

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<sup>134</sup> DAVID M. HEER, IMMIGRATION IN AMERICA’S FUTURE: SOCIAL SCIENCE FINDINGS AND THE POLICY DEBATE (1996).

<sup>135</sup> See also MOLONEY, *supra* note 6, at 25.

<sup>136</sup> HEER, *supra* note 134, at 47.

amount of executive discretion to oversee the immigration system. Bill Hing, a professor at the University of San Francisco, notes that the first federal power to deport aliens from the U.S. (though never used) was found in the *Alien Friends Act* (1798), which was part of the Alien and Sedition Laws.<sup>137</sup>

The power to deport, albeit one appearing again in narrow form, would not appear again until 1888. By 1891, however, deportation authority was back to stay. The *Immigration Act 1891* permitted the exclusion and/or deportation of many ‘undesirables’ (prostitutes, certain criminals, the mentally ill, polygamists, those likely to become public charges, those suffering from certain diseases and Chinese labourers).<sup>138</sup> By 1903 the statute included two additional lines of limitation for immigrants: (1) the statute of limitations was increased from one to three years from date of entry (except in the case of public charges, who were held to a two-year standard); and (2) the statute expanded the class of inadmissible aliens to include epileptics, those who suffered insanity within five years of entry or those having had more than one episode of insanity over the course of their lives, beggars, anarchists and importers of prostitutes.<sup>139</sup> Additional restrictions were added a few years later when Congress added ‘imbeciles’, the ‘feeble-minded’, those with tuberculosis, unaccompanied children suspected of moral turpitude, immoral woman and those with physical or mental defect that might limit ability to work in 1907.<sup>140</sup>

A decade later, in 1917, in the wake of anarchist disruptions, the World War in Europe and on the eve of the Red Scare, ‘illiterates’, those of ‘constitutional psychopathic inferiority’, alcoholics, those who had suffered more than one episode of ‘insanity’, Hindus and other ‘Asiatics’ were also forbidden.<sup>141</sup> In addition the 1917 Act established a five-year statute of limitations on deportations for those found violating the Immigration Act.

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<sup>137</sup> BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 209 (2004).

<sup>138</sup> *Id.* at 210.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Immigration Act 1917*.

However, aliens sentenced to a year's imprisonment for a crime involving moral turpitude, those advancing the overthrow of government by force and violence, and those practicing or connected with prostitution were deportable irrespective of their length of residence.<sup>142</sup> In 1918 and 1920 Congress authorized the exclusion and expulsion of anarchists including those individuals possessing explosives (even if evidence of anarchist activity could not be established) and in 1922 narcotic offenders were added to the list. In 1924, those overstaying their visas, regardless of family ties, length of stay or other mitigating factors, were subject to deportation without time limitations.

A critical juncture in deportation matters in the U.S. occurred in 1931 when Reuben Oppenheimer authored a report on the subject as part of the *National Commission on Law Observance and Enforcement* (Wickersham Commission). The report outlined considerable problems with the deportation process since it merged 'investigatory, prosecutor, and judgment functions'.<sup>143</sup> Oppenheimer emphasised the human rights concerns at the heart of deportation and noted the U.S. Supreme Court's own dicta in *Fong Yue Ting v. United States* (1893) lamenting the dire impact of forcibly removing an alien from his or her family, community and possessions.<sup>144</sup> While scholars, such as Moloney, point out that no substantive changes can be directly linked to Oppenheimer's report, it marks the first time such concerns became part of the official record.

By 1952, substantial attention was being paid to deportation on the national level. The *Immigration Act 1952* essentially consolidated many of the restrictions found in the earlier acts but also provided for relief from deportation such as the suspension provision (which was later deemed unconstitutional on other grounds<sup>145</sup>), the opportunity for voluntary departure, adjustment of status, and stay of deportation.<sup>146</sup> The law eliminated time

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<sup>142</sup> *Id.*

<sup>143</sup> MOLONEY, *supra* note 6, at 204.

<sup>144</sup> *Id.* at 205.

<sup>145</sup> *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

<sup>146</sup> HING, *supra* note 137, at 211.

limitations on most deportations.<sup>147</sup> Most notable about this law was its creation of fair hearing procedures before a special officer.<sup>148</sup> The *Immigration Act 1965* eliminated national origin immigration quotas, establishing new criteria for immigrants.<sup>149</sup> As immigration has increased from Latin America, particularly Mexico, resulting in a large pool of illegal immigrants new attempts were made to reform the system in the *Immigrant Reform and Control Act of 1986* and the *Immigration Act of 1990*. However this legislation has been unable to reconcile the often contradictory political and economic imperative and balance natural rights (or civil rights) notions of individual immigrants versus a positivist notion of the rights and security approach to American borders.

### **An Overview of the U.S. Removals Process**

The issue of immigration policy is a perennial, politically polarising issue in the U.S. Immigration policy debates are complicated, involving economic, due process and human rights and national security concerns of which deportations and removals are only on aspect. Nevertheless, removals involve a significant numbers of individuals. In FY 2013, the U.S. Immigration and Customs Enforcement Agency reported 133,551 removals.<sup>150</sup> While questions of defining the American political community is the domain of Congress and the President, American jurisprudence is marked by the role of courts in defining the contours of public

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<sup>147</sup> *Id.* (some grounds for deportation continued to be limited, such as confinement in a mental institution, becoming a public charge or any conviction for a violation of alien registration requirements).

<sup>148</sup> *Id.*

<sup>149</sup> These are: (1) unmarried adult sons and daughters of citizens; (2) spouses and unmarried sons and daughters of permanent residents; (3) professionals, scientists, and artists of exceptional ability; (4) married adult sons and daughters of U.S. citizens; (5) siblings of adult citizens; (6) workers, skilled and unskilled, in occupations for which labor was in short supply in the U.S.; and (7) refugees from Communist-dominated countries or those uprooted by natural catastrophe.

<sup>150</sup> U.S. Immigration and Customs Enforcement (ICE), ERO Annual Report (2013) <https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>.

policy insofar as it affects liberty interests. In the immigration policy domain, however, U.S. courts, have historically deferred to Congress (or the President) in determining process rights for migrants facing deportation. Similar to courts in New Zealand and Canada, U.S. courts will review final decisions, under very limited circumstances, to ensure they conform to only the most minimal of process rights consistent with the U.S. Constitution.

In the 19<sup>th</sup> century, immigration regulation function was seen as part of the constitution's sovereign powers, arising in part due to the notion that immigration policy implicates foreign relations power, which is an exclusively federal realm.<sup>151</sup> The U.S. Supreme Court has consistently noted that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."<sup>152</sup> While the U.S. Constitution was silent on this particular point, the Supreme Court in *Fong Yue Ting* held that constitutional protections do not apply to removal of resident aliens.<sup>153</sup> However, it has long acknowledged the severity of deportations when noting that removal "may result . . . in loss of both property and life; or of all that makes life worth living" and has required some measure of due process under the 5<sup>th</sup> and 14<sup>th</sup>

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<sup>151</sup> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the U.S. this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the U.S.; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the U.S. or in any department or officer thereof." *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (citation omitted).

<sup>152</sup> *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

<sup>153</sup> *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).



Amendments and a *habeas corpus* action if unlawfully incarcerated.<sup>154</sup> Yet it has held that these proceedings are nonetheless administrative, hence civil not criminal in nature. As such, as non-criminal proceedings, the individual is not entitled to the full protections of the U.S. Constitution including having limited basic rights such as the ability to cross-examine witnesses or the option to petition for a pardon.<sup>155</sup> Noted by the Court in *Fong Yue Ting*:

The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend.<sup>156</sup>

Thus, the courts have permitted Congress and the President wide latitude in this area, with the concomitant limited recourse for the immigrant facing deportation. Executive decisions to exclude or deport were considered by the courts to be part of the executive's authority under plenary powers doctrine, and not subject to judicial review. As such removal decisions are based on a *habeas corpus* review with expansive deference to Executive prerogatives and legal conclusions. The courts refused to review the factual basis of the decisions.<sup>157</sup>

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<sup>154</sup> *Ng Fung Ho v. White*, 259 U.S. 276,284 (1922); *Wan Shing v. United States*, 140 U.S. 424 (1891).

<sup>155</sup> *MOLONEY*, *supra* note 6, at 199.

<sup>156</sup> *Fong Yue Ting*, 149 U.S. at 730.

<sup>157</sup> "Until the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive. However,

The continuing rise in deportations has its policy origins in the 1990s with the passage of the *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA). Its policy origins are further rooted within the political context of that era demanding a firmer law and order posture in domestic criminal justice policy.<sup>158</sup> Importantly, these changes were made retroactively, ensnaring many individuals who had lived nearly their entire lives in the U.S. in removal proceedings, and eventually on to countries in which they had little to no family or community networks.<sup>159</sup> These individuals were not afforded a right to counsel (counsel could be procured at the detained individual's own expense) during the Bureau of Immigration Appeals process. The 1996 *Antiterrorism and Effective Death Penalty Act* (AEDPA) also limited habeas corpus rights for non-citizens. At the same time, the rise in removals has often led to indefinite detention awaiting removal and has led to domestic and international criticism. The 2005 REAL ID Act continued to tighten removal provisions, narrow appeals rights to aggrieved non-citizens and expand the scope of terror-related activity making an alien inadmissible or deportable, as well as ineligible for certain forms of relief from removal.<sup>160</sup>

Removal proceedings are handled either through a normal process with a hearing before an immigration judge and subsequent appeals procedure or an "expedited track." Expedited removals are conducted for aliens who are convicted of 'aggravated felonies'.<sup>161</sup> These proceedings are meant to occur while the inmate is incarcerated for the underlying offense and can even be entered at time of sentencing by a U.S. District Court judge provided certain conditions are met.<sup>162</sup> This process is required by statute to adhere

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they did review the Executive's legal determinations." *I.N.S. v. St. Cyr*, 533 U.S. 289, 306 (2001).

<sup>158</sup> MOLONEY, *supra* note 6.

<sup>159</sup> *Id.* at 219.

<sup>160</sup> MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CRS REPORT TO CONGRESS, IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005 (2005).

<sup>161</sup> 8 U.S.C. § 1228 (a)(3) (2013).

<sup>162</sup> 8 U.S.C. § 1228 (c)(1).

to only minimal due process or natural justice principles. Evidence must be received, a record maintained and the prospective deportee must have adequate notice and information concerning the grounds for deportation.<sup>163</sup> Monitoring and evaluation is provided by the Attorney General and Comptroller General. Essentially, the process is designed in order to verify the prospective deportees' identity and to affirm the grounds for removal. There is a limited right to appeal afforded the prospective deportee.<sup>164</sup>

The usual process is where the Department of Homeland Security (DHS) commences a removal proceeding of a non-citizen it wishes to remove by serving a "notice to appear" on the immigrant individuals non-citizen.<sup>165</sup> DHS is usually represented by an assistant chief counsel in Immigration and Customs Enforcement (ICE), an agency of DHS. The immigration judges are part of the Office of the Chief Immigration Judge (OCIJ), which is a part of the Executive Office for Immigration Review (EOIR) and operates under the authority of the Attorney-General. Unlike the process currently employed in New Zealand, for example, prospective deportees are permitted a hearing in front of the immigration judge, who must conduct an impartial proceeding where the DHS and the non-citizen are opposing parties.<sup>166</sup> An opportunity for the production of evidence, including testimony, is afforded the prospective deportee. At the same time, this is not a judicial proceeding but an administrative one, employing a lower standard of proof justifying deportation and far fewer protections than a criminal defendant is afforded. The burden of proof is on the non-citizen to show they are admissible or non-deportable.<sup>167</sup>

As an initial matter, the immigration judge determines if the immigrant may be removed under any of the statutorily enumerated

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<sup>163</sup> 8 U.S.C. § 1228 (b)(4)(A)-(F).

<sup>164</sup> 8 U.S.C. § 1228 (3)(A)(i).

<sup>165</sup> I owe a description of the initial determination and review process discussed below to Stephen H. Legomsky, author of *Fortieth Annual Administrative Law Issue: Immigration Law and Adjudication: Restructuring Immigration Adjudication*, 59 Duke L.J. 1635, 1641-44 (2010).

<sup>166</sup> 8 U.S.C. § 1229.

<sup>167</sup> 8 U.S.C. § 1229 (c)(2).

grounds, such as criminal activity, security risks, or unlawful entry into the U.S.<sup>168</sup> If the judge determines that the individual is either inadmissible or subject to removal, the immigration judge then decides any affirmative applications for relief (i.e. asylum and a narrower remedy called “restriction on removal”<sup>169</sup>) which may have been filed by the immigrant.<sup>170</sup> The judge then renders an oral or written decision at the conclusion of the hearing which includes a formal order directing the person be removed from the U.S., terminating the proceedings, or otherwise disposing of the case.<sup>171</sup>

Either of the parties may appeal the decisions to the Board of Immigration Appeals (BIA), which is part of EOIR under the authority of the Department of Justice and the Attorney General. A filing of an appeal must be made within thirty (30) days of the immigration judge’s decision and order and automatically stays the initial order pending the outcome of the appeal. The attorney general appoints the members of the BIA, establishes its procedures and can review individual decisions.<sup>172</sup> A large majority of the cases decided by the BIA are decided by single member panels and, within a specified number of categories, may be made by providing reasons. The appellate process entails a review of the immigration judge’s legal conclusions and discretionary decisions *de novo*, but due to reforms enacted in 2002, the appellate review may not

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<sup>168</sup> 8 U.S.C §§ 1182, 1227.

<sup>169</sup> “Asylum, which is discretionary, enables the recipient to remain in the U.S. and, subject to some limitations, to bring in a spouse and children. Withholding of removal merely immunizes the person from return to the country in which his or her life or freedom is threatened (not from return to a third country), and it makes no provision for the admission of family members.” Legomsky, *supra* note 165, at 1642 n.19.

<sup>170</sup> 8 U.S.C § 1229a(c)(4)(A) (the consideration of properly filed affirmative applications for relief usually a determination of whether the individual has met the statutory requirements for relief and whether the discretion of the judge should be exercised under the individual circumstances).

<sup>171</sup> 8 C.F.R. § 1240.

<sup>172</sup> 8 C.F.R. § 1003.

reverse factual findings, including credibility determinations, unless they are “clearly erroneous.”<sup>173</sup>

The Federal Court may review the BIA decision and lower decision by the immigration judge. The judicial review is not done in the federal district court. Rather the only procedure for obtaining a review of an immigration decision to file a review petition in the court of appeals for the circuit in which the initial immigration hearing took place. The petition must be filed within thirty (30) days of the final order of removal and cannot be extended.<sup>174</sup>

Consistent with the idea that immigration matters are issues of a “political” nature, there are significant restrictions of the judicial review process. First, *The Antiterrorism and Effective Death Penalty Act of 1996* (“AEDPA”) and the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (“IIRIRA”) barred judicial review of removal orders for non-citizens convicted of certain crimes.<sup>175</sup> Second, it prevents judicial review of certain discretionary acts and decisions in the immigration process of the Attorney General and his agents. As amended in 1996 and 2005, the INA precludes judicial review of certain discretionary waivers from removal, as well as any other discretionary decision (except for the grant of asylum), while constitutional claims and questions of law remain reviewable by the courts of appeals.<sup>176</sup> Third, the appeals court may not remand cases to the BIA for further fact finding under the *Hobbs Act* standard, which allows for the court to require further fact finding where the additional evidence is material and there exists reasonable grounds for failure to adduce the evidence before the agency.<sup>177</sup> Finally, with passage of the REAL ID Act in 2005<sup>178</sup> Congress eliminated habeas jurisdiction for removal orders

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<sup>173</sup> Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 Nev. L.J. 499, 502-03 (2008).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Report to the House of Delegates*, A.B.A. COMMISSION ON IMMIGRATION, available at [http://www.americanbar.org/content/dam/aba/migrated/Judicial\\_Review\\_of\\_Immigration\\_Decisions\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Judicial_Review_of_Immigration_Decisions_1.authcheckdam.pdf).

<sup>177</sup> 28 U.S.C. § 2347(c).

<sup>178</sup> Pub. L. No. 109-13, 119 Stat. 231 (2005).

(except expedited removal). The courts of appeals continue to review constitutional claims and questions of law and have authority for habeas corpus review.

### **Deportation Under U.S. Laws**

There are several grounds under current U.S. law upon which one may be deported. Besides the rather pedestrian matters related to visa applications used to gain entry to the country are, grounds for deportation include: smuggling<sup>179</sup>; marriage fraud<sup>180</sup>; assorted criminal offences, including aggravated felonies<sup>181</sup>, failure to register as a sex offender<sup>182</sup> and drug related convictions<sup>183</sup>; being a drug abuser or addict<sup>184</sup>; firearms offenses<sup>185</sup>; espionage<sup>186</sup>; domestic violence and violations of protection orders<sup>187</sup>; trafficking<sup>188</sup>; being a public charge within five years of arrival in U.S.<sup>189</sup>; being an unlawful voter<sup>190</sup>; and the rather amorphous category of those deemed not to be within the American ‘foreign policy’ interest.<sup>191</sup>

Importantly, U.S. immigration law provides a sliding scale of process rights afforded to a prospective deportee based on the factual circumstances leading to the person’s presence and grounds for removal. The Immigration and Nationality Act (INA), for

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<sup>179</sup> 8 U.S.C. § 1227 (a)(1)(E).

<sup>180</sup> 8 U.S.C. § 1227 (a)(1)(G).

<sup>181</sup> 8 U.S.C. § 1227 (a)(2)(A)(iii) (aggravated felonies are defined in 8 USC § 1101(a)(43) and include such serious violent offenses as rape (A), murder (A) and sexual abuse of a minor (A) but also include offenses such as forgery (R), theft (G) and prostitution (K)).

<sup>182</sup> 8 U.S.C. § 1227 (a)(2)(A)(v).

<sup>183</sup> 8 U.S.C. § 1227 (a)(2)(B).

<sup>184</sup> 8 U.S.C. § 1227 (a)(2)(B)(ii).

<sup>185</sup> 8 U.S.C. § 1227 (a)(2)(C).

<sup>186</sup> 8 U.S.C. § 1227 (a)(2)(D).

<sup>187</sup> 8 U.S.C. § 1227 (a)(2)(E).

<sup>188</sup> 8 U.S.C. § 1227 (a)(2)(F).

<sup>189</sup> 8 U.S.C. § 1227 (a)(5).

<sup>190</sup> 8 U.S.C. § 1227 (a)(6).

<sup>191</sup> 8 U.S.C. § 1227 (a)(4)(C).

instance, distinguishes between circumstances of the migrant's arrival in the U.S. and grounds for deportation arising from criminal convictions. Moreover, the removal policy has been marked by a shift towards encouraging prospective deportees to voluntarily depart the U.S., thereby waiving their due process rights all together.<sup>192</sup> These 'voluntary departures' are handled at the immigration officer stage with the individuals electing this process never appearing before a judge. This may benefit migrants because they are more quickly freed to return to their home country rather than face the possibility of indeterminate detention in the U. S. (awaiting final determination of their deportation).<sup>193</sup> In addition, since the individual voluntarily returned, their ability to apply to return to the U.S. is significantly shorter than those individuals contesting deportation who are ultimately involuntarily removed. This option is unavailable to 'aggravated felons' and those suspected of terrorist links.

While this mechanism is of increasing importance in the execution of U.S. immigration policy, use of the immigration judge process is still the most common form of removal. These quasi-judicial proceedings operate in a manner similar to normal court proceedings with evidence and testimony. In addition, individuals can choose to enter into a stipulated order of removal at this stage, which foregoes the full proceeding. This approach has proven controversial since many such agreements are executed without the benefit of counsel, an otherwise fundamental right in the U.S. Another vehicle for case resolution in the immigration judge stage of proceedings is through the 'expedited removal proceeding' established by the 1996 Immigration Reform and Immigrant Responsibility Act (IIRIRA). This special process applies only to those immigrants who are not seeking asylum or are similarly situated individuals who entered unlawfully and have been in the U.S. for less than two years and are otherwise ineligible for admission to the U.S. as normal applicants, often due to defects in

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<sup>192</sup> 8 U.S.C. § 1229 (c).

<sup>193</sup> There are however significant issues regarding due process in these situations. *See United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010).

the visa application process.<sup>194</sup> This process has been used primarily in border contexts.

The INA also permits expedited removals for so-called ‘aggravated felons’.<sup>195</sup> This process is more akin to the New Zealand deportation process in that it circumvents the judicial (or quasi-judicial) process all together. Here, an executive official serves a document called a ‘Final Administrative Deportation Order’ on the aggravated felon proposed for removal. This provides for an executive review (without a judge) and a hearing where the proposed deportee can review evidence against them and be represented by counsel (though counsel will not be provided for them at state expense). This second official receives all of the evidence submitted by the first executive official and anything offered by the proposed deportee. In essence, the second official’s function is to confirm the veracity of the claims made in the Final Administrative Deportation Order, including verification of identity, and if so satisfied, to affirm the deportation. If this order is affirmed, then the individual is deported after fourteen (14) days, provided that an appeal of this decision is not lodged within that time frame.

The minimal impact of domestic constitutional standards must be understood with the context of various international legal instruments that have an import in U.S. deportation matters. An international instrument often invoked to thwart government attempts at removal is the *UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT)*.<sup>196</sup> As the title suggests, the treaty obligates signatories to not only refrain from the use of torture, cruel, inhuman or degrading treatment of people but also forbids the transfer of an individual where substantial grounds exist to believe the person would be in danger of torture in the country of destination.

While the proscription against removal appears to be strong, CAT, Article 3, does not *expressly* prohibit persons from being

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<sup>194</sup> 8 U.S.C. § 1225.

<sup>195</sup> 8 U.S.C. § 1228 (b).

<sup>196</sup> CAT, Art. 3.



removed to countries where they would face cruel, inhuman or degrading treatment not rising to the level of torture.<sup>197</sup> Thus, in the wake of CAT, a nation, in order to deport someone to a third country, must make a determination that includes taking into account ‘all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant, or mass violations of human rights’.<sup>198</sup> The Presidential message accompanying this Convention to Congress included an instruction that authorities charged with making such determinations must decide whether and to what extent these considerations are relevant in a particular case.<sup>199</sup> Similar to other removal provisions, the responsible international monitoring body has interpreted the burden of proof to be on an applicant for non-removal.<sup>200</sup>

The CAT covers acts of torture committed by or at the acquiescence of a public official.<sup>201</sup> The threshold standard would be that an expulsion is prohibited where it is deemed more likely than not that torture would ensue.<sup>202</sup> All the evidence required, at a minimum threshold, is ‘credible testimony’<sup>203</sup> of torture. But this evidence must not be of a general nature. The BIA, as the Appellate administrative body within EOIR, has held that the evidence concerning likelihood of torture must be particularised to the individual proposed for removal. Evidence of other, similarly situated individuals is insufficient. In sum, the victim of torture must be the applicant, and he or she must furnish evidence of a pattern of gross human rights violations within the community together with any other relevant information. In domestic law, the

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<sup>197</sup> Michael John Garcia, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, in BORDER SECURITY AND THE REMOVAL OF ILLEGAL ALIENS 1 (Taylor Lindall ed., 2011).

<sup>198</sup> *Id.* at 5, citing CAT Art. 3(2)).

<sup>199</sup> *Id.* (citing Presidential message to congress transmitting the convention against torture etc. (reprinted in 13857 U.S. Con. Serial Set at 3(1990))).

<sup>200</sup> *Id.* (citing Art 22, General Comment 1, at ¶ 5).

<sup>201</sup> *Id.* at 7 (citing Senate Resolution 101-30 (1990)).

<sup>202</sup> *Id.* at 9.

<sup>203</sup> 8 C.F.R. § 208 16(c)(2) (2000).

*Foreign Affairs Reform and Restoration Act of 1998*, (FARRA) states unambiguously that the policy of the U.S. is to not expel, extradite or involuntarily remove a person to a country where there are substantial grounds for believing that the person would be in danger of torture.<sup>204</sup> Notwithstanding this prohibition, the government can still deport if under *Immigration and Nationality Act* where the individual has been convicted of a particularly serious crime and is, as such, a danger to the community in the U.S.<sup>205</sup>

Individuals often invoke Article 3 of CAT to appeal under FARRA after a final order of alien removal under section 242 INA section 2242(d) but have not had much success.<sup>206</sup> In 2007, there were 28,130 claims made under CAT; only 541 succeeded.<sup>207</sup> In four years following CAT implementation, 1,700 aliens were granted deferral. The appeals that have been made, however, have resulted in some guidance on what conditions must be present in order to establish one's burden of proof. For instance, the Sixth Circuit suggested that long stays in substandard prisons are not considered 'torture' within the meaning of CAT but, rapes, domestic violence permitted by local law enforcement and intentional cigarette burns by police might be considered torture.<sup>208</sup>

Other than these few opportunities to avail themselves to international legal documents there are limited opportunities for individuals to have a removal order quashed or cancelled on humanitarian and compassionate grounds. Setting aside those individuals applying as refugees or for asylum,<sup>209</sup> there are two

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<sup>204</sup> *Id.*

<sup>205</sup> *Immigration and Nationality Act* s. 241(b)(3)(B)

<sup>206</sup> *Id.* at 11.

<sup>207</sup> U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION STATISTICS YEARBOOK (2007).

<sup>208</sup> *Ali v. Reno*, 237 F.3d 591, 598 (2001).

<sup>209</sup> There is a procedure for the consideration of additional humanitarian factors in asylum procedures. Where an individual has established past persecution and a well-founded fear of future persecution if returned they are returned to their home state, DHS has the opportunity to rebut this presumption. DHS may rebut the presumption by demonstrating that circumstances in the home country have changed so that the applicant would no longer be at risk of persecution. If DHS

primary ways of avoiding deportation once the deportation process is complete and an adverse determination has been made: the

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successfully rebut the presumption of future persecution, the burden reverts back to the applicant to demonstrate eligibility for a humanitarian grant of asylum pursuant to 8 C.F.R. § 1208.13(b)(1)(ii)(A) or (B). The BIA and courts of appeals have often stressed that an applicant must still demonstrate past persecution in order to be eligible for humanitarian asylum. *Mambwe v. Holder*, 572 F.3d 540, 549 (8th Cir. 2009), *Ben Hamida v. Gonzales*, 478 F.3d 734, 741 (6th Cir. 2007), *Matter of L-S-*, 25 I&N Dec. 705, 710 (BIA 2012). The individual then has the opportunity to show that he/she has compelling reasons to be fearful and unwilling to return to the home country because of past persecution. 8 C.F.R. § 1208.13(b)(1)(ii)(A). Individual may be eligible for humanitarian asylum on these grounds when they have suffered “an atrocious form of persecution that results in continuing physical pain and discomfort.” *Matter of L-S-*, at 712. Put another way, the applicant must establish that the “past persecution was so severe that repatriation would be inhumane.” *Abrha v. Gonzales*, 433 F.3d 1072, 1076 (8th Cir. 2006). The focus of the inquiry is on the degree of harm suffered, the length of time over which the harm was inflicted, and the lingering physical and/or psychological effects of the harm. *Id.* Alternatively, the applicant may qualify based on a reasonable probability of other serious harm upon removal to the country of origin. 8 C.F.R. § 1208.13(b)(1)(ii)(B). The serious harm need not be inflicted on account of a Convention on the Status of Refugees ground, or even in connection with the past persecution, but it must be so serious that it equals the severity of persecution. Determinations of when other serious harm rises to this level are best made on a case-by-case basis. In its most recent decision on humanitarian asylum the BIA provided a litany of examples of situations that might reach that level. In one case involving an LGBT applicant the Ninth Circuit held that internal relocation was not available to a gay HIV+ Mexican man who would face “unemployment, a lack of health insurance, and the unavailability of necessary medications in Mexico to treat his disease,” because he would likely experience other serious harm. *Id.* (citing *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1090-91 (9th Cir. 2005)). Other examples of serious harm could include: extreme circumstances of inadequate health care, *Pllumi v. Att’y Gen. of U.S.*, 642 F.3d 155, 162 (3d Cir. 2011); mental anguish of a mother who was a victim of FGM having to choose between abandoning her child or seeing the child suffer the same fate, *Kone v. Holder*, 596 F.3d 141, 152-53 (2d Cir. 2010); or unavailability of psychiatric medication necessary for the applicant to function, *Kholyavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008). *Asylum Basics: Elements of Asylum Law*, 3.5 Humanitarian Asylum, IMMIGRATION EQUALITY, <http://immigrationequality.org/issues/law-library/lgbth-asylum-manual/asylum-basics-elements-asylum-law/>.

prospective deportee can seek a cancellation or suspension of the order to deport. Essentially, these procedures embody consideration of the ‘humanitarian’ principles discussed above. These steps can be thought of as pleas for leniency after a decision has been handed down. The deportation determinations process is quite mechanistic or ministerial in its preoccupation with merely establishing the grounds for removal, matching them with applicable statutory standards on such grounds and providing a second set of eyes to verify the veracity of the grounds for removal, including verifying the identity of the proffered deportee. Only after the decision to remove has been reached, will the court consider the possibility of cancelling the order of removal.

## V. ANALYSIS

Under U.S. law, once one is subject to a removal order, he or she can apply for a cancellation of the order.<sup>210</sup> Cancellation is the functional equivalent of establishing humanitarian grounds for remaining in either Canada or New Zealand following an order of removal. Importantly, those deported under the expedited process are not eligible to apply for cancellation of the removal.<sup>211</sup> Both permanent and temporary residents may apply for cancellation, though the requirements for temporary residents are more onerous. In essence, the Attorney General “may” cancel removal when certain prerequisites are met — such as length of residence in the U.S.,<sup>212</sup> is of good moral character,<sup>213</sup> has not been convicted of certain offenses not included within the ‘aggravated felonies’ category;<sup>214</sup> and the potential deportee establishes that removal would result in “exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the U.S. or an alien lawfully admitted for permanent residence.”<sup>215</sup> Special

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<sup>210</sup> 8 U.S.C. § 1229b (a).

<sup>211</sup> 8 U.S.C. § 1229b (a)(3).

<sup>212</sup> 8 U.S.C. § 1229b (b)(1)(A).

<sup>213</sup> 8 U.S.C. § 1229b (b)(1)(B).

<sup>214</sup> 8 U.S.C. § 1229b (b)(1)(C).

<sup>215</sup> 8 U.S.C. § 1229b (b)(1)(D).

provision is also made for cancellation of removal orders for victims of domestic violence within this section.<sup>216</sup> In essence, the mechanism of cancellation serves as a final review mechanism in which evidence concerning mitigating humanitarian considerations can be taken into account as a final step in the process. While the law makes no specific provision for the presentation of international obligations in this section and indeed contains no requirement that the reviewing authority consider them, there is no bar to their inclusion at this stage. Certainly, given the fact of the order of removal the only question remaining is whether these other factors should militate against the execution of the removal. Cancellation will return the person to status of an alien lawfully admitted for permanent residence still subject to all of the laws pertaining to prospective residents. Moreover, while ostensibly a vehicle for humanitarian concerns to thwart removal, the law limits the number of cancellations that Attorney General may grant to 4,000 per year.<sup>217</sup>

The above discussion shows significant commonalities across the removal process and humanitarian and compassionate appeals in these three countries. The U.S. immigration law maintains ostensibly humanitarian factors in its administration of immigration decisions through the cancellations process. New Zealand immigration officials are permitted to consider such factors along with international obligations when determining whether or not to issue deportation orders. Canadian courts have determined a six-factor test to determining a humanitarian and compassionate appeal of deportation. In each case, the 'alien' is deemed to have lesser substantive rights than citizens. Judicial review in all three cases is limited to verifying that only minimal aspects of natural justice rights have been met during the respective administrative processes. New Zealand's process seems to require the least in terms of even these minimum requirements by not requiring a record be kept by the immigration officer as to the considerations of international humanitarian authority, if any, considered in the

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<sup>216</sup> 8 U.S.C. §§ 1229b (2), (5).

<sup>217</sup> 8 U.S.C. § 1229b (e).

decision-making process. Furthermore, all three countries share public safety, national security or foreign policy interests as factors of consideration in such proceedings.

This similarity of law is reflected by shared interests in the underlying immigration national policies. In the late nineteenth and early twentieth centuries' immigration policy in all three states had similar racist ethos and economic development considerations. Later they encouraged open immigration system designed to fuel economic growth but retained a strong racist or native bias against various classes of immigrants.<sup>218</sup> The post-War, post-colonialist world saw all states move away from explicit racial or ethnic categories to an immigration system founded on national economic development, family unification and protection of refugees and other person who have been subject to discrimination, persecution or other humanitarian and political tragedies. Despite their different constitutional bases the courts and the legislation of each state when considering immigration issues have taken constitution principles, rules and values, which include concern of governmental power and individual rights and dignity (both natural, positive and common law), have been imported in the public administrative law to create unique areas of the law. Thus paradoxically due process considerations are embedded within plenary power.

Against this common policy and legal background, all the states have retained, without significant judicial review or constitutional scrutiny, the right to remove undesirable non-citizens. While the amount of removals as a percentage of the total immigrant populations remains small, they have been averaging between one percent and three percent (1%-3%) per annum in the U.S., the overall trend since the late 1990's has been moving towards increasing removals.<sup>219</sup> This increase of removals has been enabled by a narrowing of the class of individuals ineligible for permanent residency and who may not appeal their exclusion or removal. Moreover, process changes such as "fast-track"

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<sup>218</sup> MOLONEY, *supra* note 6, at 25.

<sup>219</sup> MOLONEY, *supra* note 6.

procedures to expedite removal together with an expansion of executive discretion and the lessening of judicial scrutiny of factual and legal determinations of humanitarian and compassionate appeals have combined to create significant burdens to avoid removal.

Why these various states have all streamlined their removal procedures and limited appeals from each individual state is an issue beyond the scope of this paper. Various factors, from the securitization of immigration issue with the rise of fundamentalism in the post-cold war world, to economic uncertainty, xenophobia and nativist sentiment, the perceived failure of assimilative and multicultural policies have been noted. Whatever the cause, it is evident that the sovereign prerogative as embodied by executive or ministerial authority continues to dominate and is becoming increasingly dominant in this area of the law. The narrowing of humanitarian and compassionate appeals are bound up in this process. Yet it is clear the humanitarian and compassionate factors can be important considerations for cancelling or quashing removal or exclusion decisions in each state.

## VI. CONCLUSION

It is evident with the consideration of the three jurisdictions that humanitarian and compassionate appeals have become more difficult to make and win. Legislation in all three states have precluded certain classes of individuals from making an appeal and the facts relating to personal hardship which may be placed before the appropriate authority have been circumscribed and conditioned. Constitutional and international legal obligations which may be appropriate and in other instances are incorporated into domestic law are often read down, overlooked or ignored. First, the classes of individuals excluded individuals who may *not* apply for these appeals have been expanded – particularly in those categories related to terrorism and serious crime. These expanded classes reflect an increased national security orientation found in immigration law and policy. This security orientation has accompanied a renewed paradoxical notion of national identity and exclusive citizenship based on that national identity and universal

rights. Second, the equitable factors upon which these appeals are based have been narrowed. In all these states, the international factors set out in instruments such as CAT which in themselves could be used to support a “humanitarian and compassionate” appeal are excluded from consideration or may be re-considered by the courts if denied by the executive. These developments narrow the broad range of family, social, emotional, medical, economic, cultural factors and circumstances which may be relevant to these types of appeals. Third, the range of executive discretion has increased and has accompanied the lessening traction of administrative, due process and constitutional review by the courts. The governments in each state have narrowed or qualified the factors to be reviewed (such as the seven-prong test in New Zealand) and opened the process up to a wide relatively standard-less discretion (e.g. “voluntary departures” in the U.S.). This process has been accomplished by legislative and executive innovation acquiesced to by the courts under separation of power and administrative law principles. As such, there is an illusion of wide ranging consideration. It appears that the decision maker may consider any relevant factors but it cannot be determined whether any prohibited or material factors are included in the decision. A problem compounded by the use of various administrative procedures, which prevent the development of a requisite record to enable the court to review a decision.